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No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1956

HENRY T. McKINNEY, PETITIONER

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of Henry T. McKinney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on December 22, 1956.[1]

OPINIONS BELOW

The United States District Court for the Eastern District of Oklahoma rendered no opinion. The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, pp. 18-23) is reported at 240 F. 2d 8.

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[1] The Department of Justice appears for petitioner pursuant to the provisions of Section 9(d) of the Universal Military Training and Service Act of 1951, *infra*, pp. 16-17. Under the same provision, petitioner was also represented in both courts below by the Department of Justice.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1956 (App. 23-24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted to an advanced position upon his return from military service, was entitled to seniority in the new position from the date he would have obtained it had he remained in the continuous employment of the respondent.

STATUTE INVOLVED

The relevant provisions of Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U.S.C. App. 459, are set forth in Appendix A, pp. 15-17, *infra*.

STATEMENT

This action was brought by petitioner to enforce reemployment rights under Section 9 of the Universal Military Training and Service Act of 1951, *infra*, pp. 15-17. Both courts below held that petitioner's complaint failed to state a claim upon which relief could be granted. The allegations of the complaint, and the proceedings below, may be summarized as follows:

On September 25, 1950, petitioner was employed by the respondent railroad as a Relief Clerk—Chief Caller (R. 3). This position came within what was termed the Group 2 Seniority Classification in the applicable collective bargaining agreement between the railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (R. 3).

On September 26, 1950, petitioner was inducted into the military service (R. 3). On September 25, 1952, he received an honorable discharge therefrom (R. 3). On October 1, 1952, he applied for reemployment with the railroad (R. 4, 10).

On September 8 and 10, 1952, respectively—*i.e.* while petitioner was still in the military service—two positions in Group 1 Seniority Classification were bulletined, pursuant to Rule 10 of the collective bargaining agreement (R. 3). The first of these positions was that of Bill Clerk and was filled on September 15, 1952 (R. 3). The second was that of Assistant Cashier and was filled on September 22, 1952 (R. 3). Neither of these new employees was in the employ of the railroad prior to their acquisition of these positions (R. 3).

Under Rule 15 of the agreement, an employee returning after a leave of absence had the option of either (1) resuming his former position or (2) exercising seniority rights to obtain any position bulletined in his absence (R. 7). And Rule 1(3)(A) provided that employees in Group 2 Seniority Classification were entitled to preference over non-employees in the assignment to positions in Group 1, "based upon fitness and ability" (R. 6).

Upon petitioner's application for reinstatement, he was permitted to replace the man in the Assistant Cashier position and was given a seniority date in Group 1 of October 7, 1952 (R. 10). Petitioner unsuccessfully protested this seniority date on the ground that he was entitled to a Group 1 seniority date of either September 8, 1952 (when the Bill Clerk position was bulletined), or September 10, 1952 (when the Assistant Cashier position was bulletined) (R. 10).

Petitioner served in the position of Assistant Cashier until September 4, 1953, when that position was abolished (R. 4). Two days prior thereto, having received notice of the prospective abolishment, he requested that he be placed in the Bill Clerk position still occupied by the new employee (R. 4). His claim was that, since his seniority in Group 1 should have been computed from September 8 or September 10, 1952, he was senior to the man holding the position (whose seniority date was September 15) and was thus entitled to displace him (R. 4).

Petitioner's request was rejected by the railroad on the sole ground that he had been assigned a seniority date of October 7, 1952, and, as a consequence, was junior to the incumbent (R. 4). Following an unsuccessful protest of the rejection, petitioner was placed, on September 5, 1953, in a Group 2 Relief Clerk—Chief Caller position which paid $10.08 per week less than the Bill Clerk position (R. 4).

On June 3, 1955, petitioner filed his complaint in the District Court under Section 9 of the Universal Military Training and Service Act of 1951, App. A, *infra*, pp. 15-17 (R. 2-5). The relief sought was an order directing the railroad to assign petitioner a seniority date in Group 1 of either September 8 or September 10, 1952 and to place him in the position of Bill Clerk, as well as to award damages (R. 4-5).

Both the railroad and the union, which intervened as a party defendant, filed motions to dismiss the complaint on the grounds of (1) lack of jurisdiction over the subject matter; (2) failure to join an indispensable party; and (3) failure to state a claim upon which relief could be granted (R. 10-12, 14-15). On March 14,

1956, the District Court granted the motions on the third ground alone, expressly rejecting in its order the two other grounds (R. 15-16).

The Court of Appeals affirmed (App., *infra*, pp. 18-23). It held, in effect, that it was entirely irrelevant whether, as alleged, petitioner would have obtained Group 1 seniority as of September 8 or 10, 1952, had his military service not intervened. The court deemed the critical consideration to be, instead, that, had the Group 1 positions become available while petitioner was in the employ of the railroad, he would not have had "the absolute right to demand either of these positions over the non-employee applicants [but] * * * could have demanded them only after a determination of fitness and qualification" (App., infra, p. 23. In the court's view, because of this factor alone, the governing statute afforded petitioner no protection whatsoever with respect to seniority in Group 1; the consequence was that, when upon his return from service he immediately qualified for and was promoted to the higher classification, he was not entitled as a matter of statutory right to have his seniority in that classification computed from the date he allegedly would have so qualified—and been promoted—had he remained in respondent's continuous employ (App., *infra*, p. 23). In this connection the court expressed its belief that Section 9 of the Act encompasses "only such established seniority rights as [petitioner] had when he entered the service" (App., *infra*, p. 23).[2]

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[2] The Court of Appeals, as had the District Court, rejected respondents' defenses that there was no jurisdiction over the subject matter and that there had been a failure to join an indispensable party. We think that, for the reasons stated in the Court of Appeals' opinion (App. B, *infra*, pp. 20-22), that rejection was correct.

REASONS FOR GRANTING THE WRIT

By this action, petitioner invokes Section 9 of the Universal Military Training and Service Act to require his employer to grant him that seniority in the position he qualified for and obtained upon his return from military service which he would have had but for the intervention of his service.[3] In affirming the dismissal of petitioner's complaint for failure to state a claim upon which relief could be granted, the Court of Appeals has read the re-employment provisions of the Act in a manner which (1) is irreconcilable with the express statutory terms, (2) conflicts with the interpretation given by this Court and several courts of appeals to identical provisions in the Selective Training and Service Act of 1940, and (3) has the effect of substantially vitiating the force of Section 9. For these reasons, and also because the continuation of the Selective Service program renders the question of the scope of the statutory protection afforded the returning veteran in his civilian employment one of recurring importance, review by this Court is warranted.

1. Section 9(c)(1) of the Universal Military Training and Service Act, *infra*, p. 16, contains the congressional mandate, first appearing in Section 8(c) of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U.S.C. App. (1946 ed.) 308, that the returning veteran is to be restored to his job "without loss of seniority". In *Oakley* v. *Louisville & N. R. Co.*, 338 U.S. 278, which arose under the 1940 Act, this

[3] There can be no question that, had petitioner been given the Group 1 seniority to which he claims statutory entitlement, Rule 23 of the collective bargaining agreement (R. 7) would have enabled him to displace the man in the Bill Clerk position when the Assistant Cashier position was abolished.

Court held that this requirement means that the returning veteran is entitled to restoration (338 U.S. at 283):

> * * * not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable *to the position which he would have held, if he had remained continuously in his civilian employment.* [Emphasis added.]

And this "continuous employment" test was reiterated in slightly different words no less than five times in other portions of the opinion (338 U.S. at 279, 282, 284, 285).

The *Oakley* holding followed logically from the Court's earlier interpretations of the 1940 Act in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, and *Trailmobile Co.* v. *Whirls*, 331 U.S. 40. In both of these cases, the Court stated unequivocally that the purpose of Section 8(c) of the Selective Training and Service Act of 1940 was to protect veterans against being penalized for time spent in the military service.[4]

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[4] In the *Fishgold* case, the Court noted that the Act was designed to insure that the employee "who was called to the colors [would not] be penalized on his return by reason of his absence from his civilian job" (328 U.S. at 284) and that "Congress recognized in the Act the existence of seniority systems and seniority rights" and "sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence" (328 U.S. at 288). Thus, the Court concluded, the veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * He acquires not only the same seniority he had; his service in the armed

In enacting the Selective Service Act of 1948, which in 1951 was continued, with amendments not applicable here, as the Universal Military Training and Service Act, Congress carried over into Section 9(c)(1) the provisions of Section 8(c) of the 1940 Act.[5] Additionally, it codified the "escalator principle"; Section 9(c)(2) provides that:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such *status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.* [Emphasis added.][6]

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services is counted as service in the plant so that he does not lose ground by reason of his absence" (328 U.S. at 284-285).

In the *Trailmobile* case, it was again stated that the "restored veteran * * * could not be disadvantaged by his service to the nation" and was not to be penalized upon his return because of his absence from his civilian job (331 U.S. at 58). The standing of the restored veteran includes "not only his seniority status as of the time he entered the armed forces, but also that [which] would have accumulated had he remained at work until the date of his reemployment without going into the service" (331 U.S. at 56).

[5] No important substantive changes with respect to reemployment were made in the 1948 Act because of the policy that "no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2nd Sess., p. 15.

[6] The Senate Report on the 1948 Act discusses Section 9(c)(2) in terms of a "statement of policy regarding application of the 'escalator principle' " (S. Rep. 1268, 80th Cong., 2d Sess., p. 16), an

2. If effect is given to the "escalator principle", as enunciated in *Oakley* and codified in Section 9(c)(2) of the 1951 Act, it inescapably follows, we submit, that petitioner's complaint states a cause of action under that Act. In the final analysis, petitioner seeks nothing more nor less than the "status in his employment [that] he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." The complaint alleges that, had petitioner been in the respondent railroad's employ when the two Group 1 positions became available, he would have been entitled to preference over the non-employee applicants. As the court below itself conceded (App., *infra*, p. 23), that preference would have entitled petitioner to demand one of the positions so long as it was objectively determined that he was qualified. The action having been dismissed without a trial, there is, of course, nothing in the record to suggest that petitioner was not as fully qualified to perform the duties of the Group 1 positions as the non-employee applicants.[7]

Notwithstanding these considerations, the Tenth Circuit held the "escalator principle" inoperative here. Expressing its belief that the principle relates solely to "such established seniority rights [as the veteran]

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obvious reference to the "escalator principle" of the 1940 Act announced in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, *supra*. And the Section, of course, differs in no material respect from the statement of that principle in *Oakley* v. *Louisville & N. R. Co.*, *supra*.

[7] In this connection, it is worthy of note that, upon his return to civilian employment less than a month after the vacancies first occurred, petitioner was immediately permitted to displace one of the latter.

had when he entered the service," the court pointed to the fact that a Group 2 employee (such as petitioner was at the time of entering into the armed forces) does not have an *absolute right* under the collective bargaining agreement to promotion to Group 1 over non-employee applicants, in that it first had to be determined that he possessed the requisite ability (App., *infra*, 23).

This interpretation of the "escalator principle" cannot be reconciled with the statement of that principle by this Court and Congress. *Supra*, pp. 6-8. Further, it is inconsistent with the decision of the Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, and in direct conflict with the recent decision of the Sixth Circuit in *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699, as well as with the decisions of the Seventh and District of Columbia Circuits in *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579, certiorari denied, 336 U. S. 967, and *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854. None of these cases was given even passing mention by the Court of Appeals. Each holds, however, that the "escalator principle" requires that a veteran who, upon his return to civilian employment, qualifies for, and is promoted to, a higher position be given the seniority in that position that he would have had had he remained continuously in his civilian employment and thus been able to qualify at an earlier date. Necessarily, each thus rejects the "absolute right" test adopted by the court below.

In the *Diehl case*, 348 U. S. 960, the collective bargaining agreement, by an amendment executed after the veteran's return, provided for a promotion to a higher seniority classification upon the completion of a specified number of days of experience in a lower

capacity. The agreement went on to stipulate that seniority in the higher classification was to be fixed by the time that the employee qualified for promotion. The veteran, on completion of the minimum term of experience after his return from service, was denied seniority over non-veterans who, because of his absence in the armed services, had completed the set period earlier. The district and circuit courts held the veteran entitled to seniority only in the position he had held when he entered the service (211 F. 2d 95). This Court reversed *per curiam* on the basis of *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, and gave the veteran the seniority he probably would have had if he had not gone into the service. In *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6), the labor agreement conditioned eligibility for promotion to the higher seniority classification upon the satisfactory completion of an apprenticeship and the passing of qualifying examinations. When the veteran qualified on his return from service, he was given seniority in the higher classification only as of the date of his actual promotion. On the authority of the *Diehl* case, the Sixth Circuit held that his statutory reemployment rights had been violated in spite of the fact that he had no *right* to promotion and that meeting the qualifications merely made him *eligible*. In this connection, the court observed that other apprentices whose employment was not interrupted by military service had been promoted to the higher classification when they met the requisite qualifications—albeit as a matter of practice rather than of right.

In *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967, promotion depended upon the passing of a qualifying examina-

tion, employees in a lower bracket being customarily permitted to apply in order of seniority. The agreement provided that "seniority as dispatcher [the higher position] will date from date employee passes the required examination and qualifies as dispatcher." Yet the "escalator principle" was applied by the Seventh Circuit to give a veteran seniority as though he had qualified on the date upon which the man next junior to him in the lower position had been promoted —rather than as of the date, immediately following his return, upon which he passed the qualifying examination. A similar decision was reached in *Conner* v. *Pennsylvania R. Co.*, 197 F. 2d 854 (C. A. D. C.), where under the agreement an application for promotion from a lower position was "given consideration" and the transfer made if the applicant was "deemed qualified."

The result in all of these cases would have been opposite and the veterans would have been denied the seniority sought if the "absolute right" test adopted by the court below had been followed.[8]

3. The construction given to Section 9 by the court below will seriously prejudice numerous veterans within the bounds of the Tenth Circuit because of their absence in the military service—the precise evil the Section was designed to guard against. See p. 7, *supra*. As the cases we have discussed reflect, promo-

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[8] Unlike this case, *Mann*, *Conner* and *Morris* reached the Court of Appeals following the development of a full record in the district court on the issue as to the date upon which the veteran could have qualified for promotion had he not been in the military service. Recognizing the necessity of evidence on this critical issue, petitioner here requested the Court of Appeals to remand the case to the District Court to enable him to prove the allegations of his complaint.

tion to positions in higher classifications almost always involves, not only the matter of the employee's status in the lower classification, but also the successful completion of a specified training program, the passing of an examination, or some other objective demonstration of fitness. Thus, under the "absolute right" test formulated by the court below, there will be few veterans who will be able to invoke the "escalator principle" to obtain, with respect to positions received upon their return, the seniority that they would have had had military service not prevented the earlier fulfillment of the conditions precedent to acquisition of those positions.

4. There are now pending in the district courts approximately 150 cases involving the application of the "escalator principle." We have been advised by the Bureau of Veterans' Reemployment Rights of the Department of Labor that, within the near future, an additional 90 "escalator principle" cases will be referred to the appropriate United States Attorney for the institution of legal proceedings on the veteran's behalf. In these latter cases, that Bureau has made a preliminary determination that the veteran's claim is supported by the governing statute, as interpreted by this Court and the Courts of Appeals for the Sixth, Seventh and District of Columbia Circuits, and has endeavored unsuccessfully to obtain voluntary compliance on the part of the employer.[9]

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[9] The above statistical data relates only to those claims with respect to which the veteran has requested representation by the Department of Justice. We do not have available information as to the number of pending cases of this type wherein the veteran is represented by private counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorneys.

MARCH, 1957.

APPENDIX A

Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U.S.C. App. 459 (formerly Section 9 of the Selective Service Act of 1948, 62 Stat. 604, 614) provides in relevant part as follows:

> (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * * *
>
> (B) if such position was in the employ of a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * *
>
> unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * *

(e)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or (c)(1) of this section, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall

not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further,* That only the employer shall be deemed a necessary party respondent any such action.

1. *Opinion of the Court of Appeals.*

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 5436—November Term, 1956

HENRY T. McKINNEY, APPELLANT

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, APPELLEES

Appeal from the United States District Court for the Eastern District of Oklahoma

(December 22, 1956)

Before BRATTON, Chief Judge, HUXMAN and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

Henry T. McKinney, an honorably discharged veteran, brought this action against the Missouri-Kansas-Texas Railroad Company to enforce alleged employment rights under §9 of the Universal Military Training and Service Act of 1951, 50 U.S.C.A. Appendix § 459. The Union was granted leave to intervene on its own motion. He appeals from the judgment of the Court dismissing his complaint on the grounds that it failed to state a claim upon which relief could be granted.

In his complaint McKinney alleged a collective bargaining agreement dated August 1, 1925, was still in effect, between M-K-T and the Union, of which he was a member; it was claimed that this agreement gave him

rights for advancement upon his return from the service under the interpretation of the Act. The contract provides for three classes of employees, Groups 1, 2 and 3. Each Group has its own seniority schedule. At the time of his induction into the service McKinney was an employee of Group 2. Rule 15 of the contract provides that a worker returning after a leave of absence may return to his former position or exercise seniority rights to any position "bulletined" during his absence. Rule 1 (3)(A) provides that employees in Group 2 are entitled to promotions to Group 1 in preference over non-employees, "based upon fitness and ability." Rule 4 provides that upon such promotion seniority begins at the time the employee's pay starts in the respective class of service when employees are assigned to positions as provided for in Rule 10. It is by Rule 10 procedure that McKinney claims he is being denied his rights under the Act. There it is provided that vacancies will be bulletined in places easily accessible to employees and after applications are received the name of the successful applicant would be posted. Rules 1(3)(C) and 23 provide that within the respective Groups seniority might be exercised by employees whose jobs had been abolished. Grievances regarding rejection of seniority demands in that event were provided for by appeals.

On September 8 and 10, 1952, while McKinney was still in the service two positions in Group 1 were bulletined. The first was the position of bill clerk, given to R. B. Fabian on September 15, 1952, and the other was assistant cashier, given to G. B. McCuan on September 22, 1952. Both of these men were non-employees. Upon his discharge from the military on September 25, 1952, McKinney applied for re-employment and was rehired on October 2, 1952, as assistant cashier in Group 1, and was given G. B. McCuan's job.

It is McKinney's contention that when he returned

he was entitled to exercise his seniority rights and place himself in the position of bill clerk, the position held by Fabian, in accordance with Rule 1(3)(A) of the contract. When he was given G. B. McCuan's position his seniority in Group 1 was dated as of October 7, 1952. He protested claiming that his seniority should be dated either September 8 or 10, 1952, when the vacancies were first bulletined. He continued to serve as assistant cashier, however, under the protested arrangement until the job was abolished on September 4, 1953. Thereupon he reasserted his contention that he deserved higher seniority than R. B. Fabian and sought to "bump" him on that basis, and this was denied by M-K-T on the basis of his earlier assigned seniority date in Group 1. He was reassigned to his position in Group 2 held prior to his induction into the service and has held it since September 5, 1953.

The appellee Union challenges the jurisdiction of the district court on two grounds. It is urged that in any event the National Railroad Adjustment Board was vested with primary exclusive jurisdiction[10] of the controversy between these parties; that appellant McKinney could not bypass the National Railroad Adjustment Board and seek relief in the federal district court. The Railway Labor Act[11] vests in the National Railroad Adjustment Board jurisdiction to interpret agreements and adjudicate issues between railroads and their employees. The National Railroad Adjustment Board is given broad jurisdiction to interpret agreements and adjudicate issues between railroads and their employees with appropriate and comprehensive administrative procedure provided for the dis-

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[10] In Slocum v. Delaware L. & W.R. Co., 339 U.S. 239, * * * in footnote 7 the Court states: "Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction.

[11] 48 Stat. 1185, 45 U.S.C.A. §151, et seq.

charge of such functions. But Section 9(d) of the Universal Military Training and Service Act, supra, expressly gives to any qualified and returning serviceman the right to institute a proceeding in the United States Courts to require a former employer to comply with the provisions of the Act regarding preservation of re-employment and seniority rights. The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary. The Railway Labor Act is general legislation dealing with labor disputes as such. The Universal Military Training and Service Act is a specific statute for the benefit of all veterans honorably discharged and regards itself with disputes arising from such status upon their return. Being a specific statute for the resolution of specific grievances, it must control.

It is next contended by the Union that the Court lacked jurisdiction because of the absence of an indispensable party, Fabian. It is contended that Fabian's rights are involved in this controversy and that, therefore, he is indispensable to a final adjudication. The 1951 Act, however, specifically provides "That only the employer shall be deemed a necessary party respondent to any such action." Under this clear provision of the statute a controversy of this kind is solely between the returned veteran and the former employer and no one else need be joined as a party litigant.[12] The Union

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[12] United States ex rel Deavers v. Missouri-Kansas-Texas Railroad Co., 171 F.2d 961; Connor v. Pennsylvania Railroad Company, * * * 177 F.2d 854.

places strong reliance on the decision of our Court in *Johnson* v. *Interstate Transit Lines*, 163 F.2d 125. We did hold in that case that the other interested employees were indispensable parties. It is sufficient however to say that case is not controlling or in conflict with what we now hold, because it arises under the Act of 1940 which did not contain the provision of the 1951 Act quoted above or any similar provision.

On the merits we think the decision of the trial court is right. Section 9 of the Universal Military Training and Service Act merely guarantees the returning serviceman the seniority rights he would have had, had he not entered the service. It does not create or vest in a veteran additional rights beyond what he would have had, had he not gone into the service.[13] This is sometimes referred to as the escalator principle. It simply means that all of his rights including seniority move on as though he had not left the employ of the company.

To determine where he would be had he not entered the service and had he remained with the company, we then must look to the bargaining agreement. The veteran is not to be penalized by reason of military service.[14] The collective bargaining agreement classifies the employees into three Groups. Under the agreement the rights of the employees predicated upon seniority are expressly confined to members within each Group, with the further provision that employees in Group 2 have a qualified right to advance to Group 1 when a vacancy occurs. In such case they are given preference

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[13] Oakley v. Louisville & N.R. Co., 338 U.S. 278 * * *; Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 * * *; Meehan v. National Supply Co., 10 Cir., 160 F.2d 346; Hewitt v. System Federation, 7 Cir., 161 F.2d 545.

[14] Trailmobile Company v. Whirls, 331 U.S. 40 * * *.

to such advancement over non-employee applicants for the vacant spot in Group 1. This right is conditioned however upon a determination that the employee seeking such advancement is fitted and qualified for such position. Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants. He could have demanded them only after a determination of fitness and qualification. The so-called escalator clause of the Act would carry forward only such established seniority rights as he had when he entered the service.

Under Rule 4 McKinney's senority rights in Group 1 began when his pay started in that Group. His pay no doubt started on October 2, 1952, when he was rehired. It may be that his seniority in that Group began on that day rather than on October 7 when it was made to begin. It may also be that he was not entitled to "bump" McCuan because it would seem that his seniority was junior to that of McCuan's. But this was not an issue in the case. It is apparent from what has been said that his seniority rights in Group 1 were in any event junior to those of Fabian and he was therefore not entitled to "bump" him when his job in Group 1 was abolished. The conclusion we have reached on the main issue of the case makes unnecessary consideration of the question of laches.

AFFIRMED.

2. *Judgment.*

Twenty-sixth Day, November Term, Saturday, December 22nd, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of
ne record from the United States District Court for
ne Eastern District of Oklahoma and was argued by
ounsel.

On consideration whereof, it is ordered and adjudged
y this court that the judgment of the said district court
n this cause be and the same is hereby affirmed.

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